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ALEXANDER L. STEVAS,
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No. 82-1978

In the Supreme Court of the United States

OCTOBER TERM, 1982

CLYDE A. SIMPSON,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, UNEMPLOYMENT COMPENSATION BOARD OF REVIEW,
Respondent

and

THE BABCOCK & WILCOX COMPANY,
Intervenor

ON WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

Brief for Intervenor

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COUNTERSTATEMENT OF QUESTION PRESENTED

Was it a violation of the Fourth Amendment to the Constitution of the United States or of the petitioner's Constitutional right to privacy, as made applicable to the states by operation of the Fourteenth Amendment, for the Commonwealth of Pennsylvania to deny unemployment compensation benefits to the petitioner for a period of time during which the petitioner was placed on disciplinary suspension for insubordination by his employer—a private, publicly held corporation—for refusing to comply with his employer's request that he open his lunch bucket during a random, routine inspection of employees' packages at the end of a work shift?

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COUNTERSTATEMENT OF THE CASE

The present case involves a claim for unemployment compensation benefits by the petitioner, Clyde A. Simpson, for a week in June, 1980 during which he was suspended from work by his employer, the Babcock & Wilcox Company (hereinafter the "Company"), for insubordination. The underlying reason for Mr. Simpson's disciplinary suspension was his refusal on May 29, 1980 to submit to a routine inspection of his lunch bucket by security personnel as he was leaving Company premises at the end of his shift (Petitioner's Appendix A4, A28-29, A32-33).

For at least the last twenty-eight (28) years, perhaps longer, the Company has maintained a practice of periodically conducting random inspections of employee's packages as they leave the plant at the end of a shift (Petitioner's Appendix A7-A8, A28, A32). This practice has been accepted as a term and condition of employment by the United Steelworkers of America, Local No. 1082, which union has been certified by the National Labor Relations Board as the exclusive representative of a bargaining unit of Company employees, of which Mr. Simpson is a member, for the purpose of collective bargaining in respect to wages, hours and all other terms and conditions of employment. The union has not challenged the practice either through collective bargaining or through the contractual grievance procedure.

The purpose of these inspections is to aid in the enforcement of the Company's rule against theft of Company property (Petitioner's Appendix A8, A28, A32). All employees, including Mr. Simpson, were aware of the Company's practice dealing with lunch bucket inspections and were aware further that compliance with that practice was an obligation which they voluntarily assumed as part of their continued employment (Petitioner's Appendix A8-A9, A22-A23). The inspections themselves are conducted on Company premises. No employee

leaving the plant at the appointed time, including foremen and other salaried or managerial personnel, is exempt (Petitioner's Appendix A28, A32).

On May 29, 1980, the Company conducted just such an inspection (Petitioner's Appendix A28, A32). As Mr. Simpson and a group of other employees were leaving the plant at the end of their shift, they were asked by security personnel to open their lunch buckets. Mr. Simpson adamantly refused to cooperate. He was escorted to the adjacent gatehouse for identification purposes, so that the incident could be reported to Company authorities.[1] He then left the plant, without having permitted the inspection of his lunch bucket (Petitioner's Appendix A5-A6).

As noted, Mr. Simpson was suspended for one week for his insubordination. He applied for unemployment compensation benefits for that period. The Pennsylvania Office of Employment Security determined that his suspension was occasioned by his own "willful misconduct" and that he was therefore ineligible for benefits under §402(e) of the Pennsylvania Unemployment Compensation Law, Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, Pa. Stat. Ann. tit. 43, §802(e) (Purdon). (Petitioner's Appendix A4). Pennsylvania Unemployment Compensation Referee Jean M. Warwick, however, reversed the Office's decision and awarded benefits, concluding that, although "the employer's practice of conducting 'lunch box searches' was reasonable," "the claimant's conduct...was [also] reasonable and with 'good cause'" (Petitioner's Appendix A34.) The Company appealed, and the Pennsylvania Unemployment Compensation Board of Review reinstated the Office's finding of willful

[1] Contrary to the contentions of Mr. Simpson's counsel, the record does not support his statement that Mr. Simpson "was taken by force to the guardhouse." In this regard, it is worth noting that Mr. Simpson has never instituted civil or criminal proceedings for assault and battery or false imprisonment, either against the Company or against its security personnel.

misconduct. The Board ruled that, with regard to the question of reasonableness, the Company's interests outweighed those of Mr. Simpson (Petitioner's Appendix A30).

Mr. Simpson then pressed his claim to the Pennsylvania Commonwealth Court, arguing, as he had below, that the Company's practice of lunch bucket inspections violated his constitutional right against unreasonable searches and seizures and his constitutional and common law rights to privacy. Therefore, he reasoned, his refusal to cooperate with that practice could not constitute willful misconduct. The Commonwealth Court, speaking through Judge Williams, rejected each of Mr. Simpson's arguments and affirmed the Board's denial of benefits (Petitioner's Appendix A3-A27). The Pennsylvania Supreme Court, by order of February 28, 1983, in response to Mr. Simpson's Petition for Allowance of Appeal, declined to review the Commonwealth Court's decision (Petitioner's Appendix A2).

SUMMARY OF ARGUMENTS

1. This Court's jurisdiction to review the present case is based entirely on the petitioner's claims that the Company's practice of randomly inspecting employees' packages violates the Fourth Amendment or the petitioner's federal Constitutional right to privacy. These Constitutional guarantees, however, protect individuals only against governmental intrusion; state action is a requisite element of the petitioner's claims. The Company is a private party and conducts its inspections of employees' packages without participation by or color of governmental authority of any kind. In fact, the petitioner has presented no plausible argument that state action was involved in the present case. His Constitutional claims are frivolous and wholly without foundation. Where this is so, this Court is without jurisdiction to review such claims.

2. The decisions of the Pennsylvania courts for which the petitioner seeks review, insofar as they determine claims aris-

ing under the Constitution of the United States, do not conflict with decisions of this Court or of other state or federal courts. Furthermore, the Pennsylvania courts have decided no heretofore unsettled question of federal law. Rather, the state courts have simply applied well settled principles of Constitutional law to the circumstances of this case. Accordingly, review by this Court is not warranted, and certiorari should be denied.

ARGUMENT

I. This Court is without jurisdiction to review the decisions of the Pennsylvania courts in the present case.

In the Pennsylvania courts the petitioner has variously argued that he should have received unemployment compensation benefits because the Company's practice of randomly inspecting employees' packages violated (1) his right under the Fourth Amendment to the Constitution of the United States against unreasonable searches and seizures, (2) his federal Constitutional right of privacy, (3) his right under Article I, Section 8 of the Pennsylvania Constitution against unreasonable searches and seizures, (4) his state constitutional right of privacy, and (5) his common law right against invasion of privacy. Although he fails to definitively set forth the grounds for his Petition to this Court, he appears again to advance each of these five claims. However, none but the first two of these, which claims arise under the Constitution of the United States, may be considered by this Court; this Court may not review a state court's determination with regard to alleged violations of state law. *See Voeller v. Neilston Warehouse Co.*, 311 U.S. 531, 535 (1941); 28 U.S.C. §1257. Thus, this Court's jurisdiction in the present case is based entirely on the petitioner's claims of violations of the Fourth Amendment and of his federal Constitutional right of privacy.

The mere recitation of Constitutional claims, however, is not sufficient to confer jurisdiction upon this Court. Such

claims "must not be frivolous or wholly without foundation"; rather, they "must at least have fair color of support, for otherwise an utterly baseless Federal right might be set up or claimed in almost any case, and the jurisdiction of [the Supreme Court] invoked merely for purposes of delay." *Parker v. McLain*, 237 U.S. 469, 471 (1915); *see, e.g., Wick v. Chelan Electric Co.*, 280 U.S. 108 (1929); *New Orleans Waterworks Co. v. Louisiana*, 185 U.S. 336 (1902) (analysis of Supreme Court's prior decisions revealed that Constitutional claim was clearly without color of foundation).

In the present case the petitioner's federal Constitutional claims lack the substantiality necessary to permit review by this Court. Absent is the critical element of state action, without which there can be no violation of the Fourth Amendment or of the Constitutional right to privacy. The petitioner's attempts to find state action in the circumstances at bar are imaginative, at best, and serve only to highlight the weakness of his arguments. His Constitutional claims are therefore frivolous and wholly without foundation.

With regard to his Fourth Amendment claim, the petitioner himself acknowledges that no protection is afforded against searches—wrongful, unreasonable or otherwise—by private parties. Indeed, it has been settled for more than sixty years that searches or seizures by private parties cannot violate the Fourth Amendment. *Burdeau v. McDowell*, 256 U.S. 465 (1921); *see Walter v. United States*, 447 U.S. 649, 656 (1980).

Similarly, to the extent that this Court has thus far recognized a right to privacy which derives from the Constitution, that right has been limited strictly to circumstances involving unwanted governmental intrusions. *E.g., Zablocki v. Redhail*, 434 U.S. 374 (1978); *Carey v. Population Services International*, 431 U.S. 678 (1977); *Moore v. East Cleveland*, 431 U.S. 494 (1977); *Cleveland Board of Education v. Le Fleur*, 414 U.S. 632 (1974); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v.*

Baird, 405 U.S. 438 (1972); *Loving v. Virginia*, 388 U.S. 1 (1967); *see Stanley v. Georgia*, 394 U.S. 557, 564 (1969). No decision by this Court has yet unearthed from the Constitution a right to be free from unwanted intrusions by private parties. Indeed, the petitioner has cited no decision by *any* court supporting such a right.

The Company in this case is a private party. It is not engaged in a state regulated industry; it has no monopoly with respect to any product or service; its officers and directors are neither elected by the public nor appointed by public officials; it is not subsidized by state or federal funds. The facility at which the petitioner was employed is a steel fabrication plant—a prototype of private industry in the United States. Furthermore, the Company's random inspections of employees' packages were and are conducted solely by its own security personnel.

In apparent appreciation of the difficulty in asserting his Constitutional claims against a private party such as the Company, the petitioner has devoted considerable imagination and creativity to a search for state action under the circumstances of the present case. He relies first upon the following testimony by the Company's Chief of Plant Security, Donald Shellenberger, which was given at the hearing before Unemployment Compensation Referee Warwick on September 11, 1980:

> QCL: Your guards, what's their relationship with the local police? Have you ever called in the polic (sic) to assist your guards?
>
> AEW5: At times, yes.

(Petitioner's Appendix A43.)

This isolated testimony, removed from its context,[2] cannot support the conclusion which the petitioner would draw

[2] In the Appendix to his Petition, the petitioner includes from Mr. Shellenberger's testimony only this single question and answer. He does so with the apparent hope that this Court will draw an inference which is not

(continued)

from it. Although Mr. Shellenberger stated that police assistance has at times been requested, he was not asked whether such assistance was ever required in connection with the inspection of employees' packages, and so the conclusion that police assist with such inspections cannot now be drawn. The Company, like any private citizen, has occasionally requested police assistance when circumstances warranted it, *e.g.*, when someone is discovered engaged in criminal activity on plant premises, but police do not participate in the inspections at issue here. Moreover, the petitioner does not dispute that police did not in any way assist with the inspection on May 29, 1980. Because the petitioner's counsel was careless in the examination of his witness, he cannot now remedy that carelessness by means of imaginative extrapolation of actual testimony.[3]

The petitioner next asserts that the Company itself is not a private party because, as a corporation, "it is wholly a creature of the state of its incorporation, deriving and owing its being to that state as surely as petitioner owes his to the Almighty." (Petition at 26). This contention introduces a radically new concept—the attribution of governmental characteristics and authority to all corporate persons—which conflicts directly with well established tenets of American jurisprudence. It therefore warrants summary dismissal.

This Court, in the context of state regulated industries (with which the state is far more closely involved than it is with the Company in the present case), has required that a complaining party show that "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as

warranted, for the context from which this testimony has been removed reveals that Mr. Shellenberger was not addressing himself to the Company's practice of randomly inspecting employees' packages.

[3]The Pennsylvania Commonwealth Court thought so little of this argument by the petitioner's counsel that it was not even mentioned in that court's opinion.

that of the State itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974). This showing is required in order "to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, ____ U.S. ____, 102 S.Ct. 2777, 2786 (1982) (emphasis original). Clearly, the petitioner cannot — nor does he purport to — make any such showing here. His reliance on the state's role in chartering the Company to furnish the requisite state action does not even recommend the fertility of his imagination.

Alternatively, the petitioner suggests — albeit not very coherently — that the Company's activities should be regarded as state action under the doctrine of *Marsh v. Alabama*, 326 U.S. 501 (1946). *Marsh* stands for the proposition that, where a company owns or possesses an entire town, the company may not exercise its property rights in that town (*e.g.*, the exclusion of trespassers) in such a way as to restrict the Constitutional (*e.g.*, First and Fourteenth Amendment) rights of the town's inhabitants. It therefore applies to a situation where a private, corporate entity assumes the role and the functions of a municipality or other governmental unit. *See Hudgens v. NLRB*, 424 U.S. 507, 512-521 (1976). It has no application to a corporation which merely owns and operates an industrial plant where employees spend only a fraction of each day during their work week. *See generally Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

Finally, the petitioner seeks to rely on this Court's decisions in *Thomas v. Review Board, Indiana Employment Security Division*, 450 U.S. 707 (1981), and *Sherbert v. Verner*, 374 U.S. 398 (1963), wherein a state's denial of unemployment compensation benefits was itself found to be state action which violated the plaintiff's Constitutional rights.[4] In each of those

[4] The petitioner also cites *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977), which had nothing to do with unemployment compensation. The plaintiff in that case challenged his public employer's motives for discharging him as violative of his First Amendment rights. The action of which he complained was clearly state action, since his employer was a public body.

cases the plaintiff's unemployment was directly attributable to his or her adherence to religious beliefs. The Court held, in substance, that the state's denial of benefits under such circumstances violated the rights guaranteed to the plaintiffs by the Free Exercise Clause of the First Amendment.

The present case may readily be distinguished from cases involving the First Amendment, such as *Thomas* and *Sherbert*. The First and Fourteenth Amendments guarantee, *inter alia.*, that the rights of free speech and the free exercise of religion may not be abridged by any law. To the extent that unemployment compensation laws deny benefits to those who become unemployed as a result of the exercise of rights which are protected by the First and Fourteenth Amendments, those laws violate the Constitution.

In the present case, however, the petitioner's temporary unemployment was not occasioned by his exercise of a constitutionally guaranteed right, since, as already discussed, he had no such right with regard to inspections or searches by a private party such as the Company. Hence, there is no basis for concluding that Pennsylvania's denial of unemployment compensation benefits is impermissible state action in violation of the Constitution. For this reason the Pennsylvania Commonwealth Court found *Thomas* and *Sherbert* inapposite (Petitioner's Appendix A19-A21).

Thus, the petitioner's arguments that state action is somewhere present in the circumstances of this case are without support by any decision of a state or federal court and are in fact contrary to settled law. Absent state action, the petitioner's Constitutional claims are frivolous and wholly without foundation. More is required to confer jurisdiction upon this Court than a fervent complaint of some perceived injustice, no matter how sincere the complainant's belief. Here the petitioner has established no basis for this Court's jurisdiction, and his Petition must therefore be denied.

II. Even if this Court has jurisdiction to review the present case, the circumstances clearly do not warrant the grant of certiorari.

"A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." U.S. Supreme Court Rule 17.1. Accordingly, relatively few of the petitions for writ of certiorari which this Court receives are worthy of its attention. Rule 17 of the U.S. Supreme Court Rules sets forth guidelines for the grant of certiorari and provides, in pertinent part, that the following cases are appropriate for the Court's review:

> (1) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (2) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

U.S. Supreme Court Rule 17.1(b) and (c). Clearly, the present case fails to satisfy these criteria.

The petitioner has cited no decision by this Court or any other court, state or federal, which is contrary to or even inconsistent with the decision of the Pennsylvania courts below. Thus, there is no conflict for this Court to resolve.[5]

[5]To the extent that the petitioner suggests that the Pennsylvania Commonwealth Court's decision in the present case is in any way inconsistent with its decision in *White v. Unemployment Compensation Board of Review*, 17 Pa. Commw. Ct. 110, 330 A.2d 541 (1975), he misrepresents the latter holding. The court in *White* noted only that it was not confronted with the issue raised by the present case and therefore did not resolve that issue at that time. 17 Pa. Commw. Ct. at 111-112. Even if the petitioner were correct, however, conflicts and inconsistencies between decisions of the courts of Pennsylvania — or of any other individual state — are not for resolution by this Court.

Furthermore, the Pennsylvania courts have decided no important question of federal law that has not been, but should be, settled by this Court, except in the most narrow sense that the precise issue in the present case, *viz.*, whether the petitioner's Constitutional rights have been violated by the denial of unemployment compensation benefits for a period during which the petitioner was placed on disciplinary suspension for refusing to cooperate with a random inspection of employees' packages by his employer, has not heretofore been decided by this Court. The resolution of that issue, however, for the reasons discussed in the immediately preceding section of this Brief, requires nothing more than the application of well settled legal principles which have been recognized by this Court and adopted by state and federal courts alike. Thus, this Court's review is not warranted by the "novelty" of the decision below.

In short, there is no "special and important" reason for granting certiorari in the present case. Despite the petitioner's colorful characterization of the issue as the restoration and preservation of the dignity and integrity of the working man, he presents no Constitutional or legal claim which requires resolution by this Court. Rather, the law applicable to his federal Constitutional claims is clear, and those claims have, in effect, already been adjudicated three times at the administrative level and twice by Pennsylvania appellate courts. He has had his "day in court," and his frivolous claims warrant no further waste of judicial resources.

In this regard, it is worth recalling the words of Chief Justice Taft concerning this Court's certiorari jurisdiction:

> No litigant is entitled to more than two chances, namely, to the original trial and to a review, and the intermediate courts of review are provided for that purpose. When a case goes beyond that, it is not primarily to preserve the rights of the litigants. The Supreme Court's function is for

> the purpose of expanding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among the intermediate courts of appeal.

Hearings before the Committee on the Judiciary of the House of Representatives on H.R. 10479, 67th Cong., 2d Sess. 2. The present case involves legal issues of such general interest and importance only in the mind of the petitioner himself. His Petition should therefore be denied.

CONCLUSION

The petitioner has failed to state federal claims sufficient to establish this Court's jurisdiction to review the decisions of the Pennsylvania courts in the present case. Even if this Court has such jurisdiction, however, the Constitutional issues raised by the petitioner are resolved by well settled principles of law. There are no special and important reasons for granting certiorari. The Petition should therefore be denied.

Respectfully submitted,

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